SUPREME COURT, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-941

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives; 1st LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; and CAPTAIN DONALD DAWSON, 307th Strategic Wing, United States Air Force, U-Tapao, Thailand,

Petitioners,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. MCLUCAS, individually and as Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Petitioners, pursuant to Rule 24(5), respectfully submit the within Supplemental Brief to invite the Court's attention to new matter not available at the time of the last filing.

I.

Counsel are pleased to inform the Court that the Secretary of the Air Force has directed that Captain Donald Dawson be granted an honorable discharge as a conscientious objector. Accordingly, counsel anticipate that court martial charges arising out of Captain Dawson's refusal to bomb Cambodia will be withdrawn in the immediate future.

II.

Unfortunately, however, respondents have persisted in imposing punitive disabilities upon Captain Michael Flugger and Captain James Strain, solely because they sought judicial review of the legality of orders directing them to bomb Cambodia.

As a penalty for having sought judicial review of the legality of orders directing them to bomb Cambodia, both Captain Flugger and Captain Strain have been permanently grounded. (Copies of respondents' orders permanently grounding Captain Flugger and Captain Strain are reproduced as a Supplemental Appendix.)

Unlike Captain Dawson, neither Captain Flugger nor Captain Strain ever disobeyed, or threatened to disobey, a miltary order. Indeed, throughout these proceedings, Captain Flugger and Captain Strain have made it clear that they were prepared to execute all orders directed to them, reserving only the right to seek judicial review of their legality.[1] Respondents have reacted to petitioners'

[1] Counsel regret inadvertent language in the Petition for Certiorari which may have implied that Captain Flugger, Captain Strain or Lt. Watson disobeyed, or threatened to disobey, a military order. Their consistent preparedness to carry out orders directed to them has never been questioned.

lawful and orderly attempt to test the legality of their Cambodian bombing orders by destroying petitioners' military careers and by imposing serious economic sanctions upon them.[2] In imposing sanctions upon Captain Flugger and Captain Strain by permanently grounding them under the Air Force's "Human Reliability Program," merely because they exercised their rights as Americans to seek access to the courts, respondents are in clear violation of repeated rulings of this Court which condemn attempts to punish individuals for seeking judicial review. E.g. *United States* v. *Jackson*, 390 U.S. 581 (1968); *Pearce* v. *North Carolina*, 395 U.S. 711 (1969). Do respondents seriously believe that the only "reliable" American pilots are those who will unthinkingly execute a military command with no concern for its legality?

The imposition of so drastic a set of collateral consequences upon Captain Flugger and Captain Strain, not only violates their constitutional rights, but precludes any assertion that this matter is moot.

Respectfully submitted,

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MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Petitioners

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[2] By permanently grounding Captain Flugger and Captain Strain, respondents have reduced them to the anomalous position of Air Force pilots who are not permitted to fly, and have reduced their salaries by approximately $165 per month.

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

[Copies of Air Force Orders Permanently Grounding Captains Flugger and Strain]

DEPARTMENT OF THE AIR FORCE
Headquarters 99th Combat Support Group (SAC)
Westover Air Force Base, Massachusetts 01022

Aeronautical Order 31 January 1974
AO-2

Captain James H. Strain, 443-40-4917, 99 Bomb Wg, (SAC), this stn, is suspended from flying status effective 31 January. Reason for suspension: Permanent disqualified under Human Reliability Program (AFM 35-99). Flying status code is changed to 2D. Authority: AFM 35-13, paragraph 2-29e(6) and Msg Hq 2AF/DP 311901Z, Jan 74.

For the Commander
(Official Seal)

Robert P. Negri, Major, USAF
Chief, Central Base Administration

Distribution
2-Hq SAC/DPACF, Offutt AFB NE 68113
2-2AF/DPA, Barksdale AFB LA 71110
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(Emblem)

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS SECOND AIR FORCE (SAC)
BARKSDALE AIR FORCE BASE, LOUISIANA 71110

REPLY TO
ATTN OF: CC 31 JAN 1974

SUBJECT: Permanent HRP Disqualification on Captain James H. Strain III

TO: 99 BMW/CC
99 CSG/DPM
IN TURN

1. Captain James H. Strain III, 443-40-4917 FV, is permanently disqualified from the Human Reliability Program effective this date.

2. This disqualification is based on Captain Strain's actions and demonstrated beliefs which are inconsistent with his utilization in human reliability certified duties.

3. Insure that all actions outlined in paragraph 1-27b, Air Force Manual 35-99, and paragraph 2-29e(6), Air Force Manual 35-13, are complied with, and that AFMPC/DPMROC1, AFMPC/DPMROC4, CINCSAC/DPAAB, and Second Air Force DPA are informed of all actions taken as a result of this permanent disqualification.

/s/ R. M. HOBAN
R. M. Hoban, Lt Gen, USAF
Commander

Cy to: AFMPC/DPMROC1
AFMPC/DPMROC4
CINCSAC/DPAAB

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 99TH COMBAT SUPPORT GROUP (SAC)
WESTOVER AIR FORCE BASE, MASSACHUSETTS 01022

AERONAUTICAL ORDER
AO-62

15 November 1973

CAPT MICHAEL E. FLUGGER, 107-34-7761, 346 Bomb Sq, (SAC), this stn, is suspended from flying status eff 3 October 1973. Reason for Suspension: Permanent disqualified under Human Reliability Program (AFM 35-99). Verbal order of the Commander on 3 Oct. 73 is confirmed, exigencies of the services precluded written orders in advance. Flying status code is changed to 2D. Auth: AFM 35-13, para 2-29e (6).

FOR THE COMMANDER
(Official Seal)

ROBERT P. NEGRI, Major, USAF
Chief, Central Base Administration

DISTRIBUTION:
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